

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS PHILLIP BUSH,

Defendant-Appellant.

UNPUBLISHED

October 2, 2003

No. 237880

Montcalm Circuit Court

LC No. 01-000069-FC

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under the age of thirteen) for which the trial court sentenced him to forty-five months to twenty years in prison. We affirm.

I. Sufficiency of Evidence

Defendant first argues that there was insufficient evidence to support his conviction. We disagree.

Upon de novo review of the record, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). However, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witness. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Circumstantial evidence and reasonable inferences can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Further, it is for the trier of fact, not this Court, to determine what inferences can be fairly drawn from the evidence and the weight accorded to those inferences. *People v Hardiman*, 466 Mich 417, 438; 646 NW2d 158 (2002).

With respect to the charges against defendant, CSC I consists of sexual penetration of person under age thirteen. MCL 750.520b(1)(a); *In re Hawley*, 238 Mich App 509, 510-511;

606 NW2d 50 (1999). MCL 750.520a(o)¹ defines “sexual penetration” as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” The victim testified that defendant put his penis in her “butt” and replied affirmatively when asked if he put it “where you go poop.” To the extent defendant’s argument centers on the witnesses’ credibility, this Court does not interfere with the jury’s role of determining credibility. *Wolfe, supra* at 514-515. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to support defendant’s conviction.

II. Evidence of HIV and Hepatitis C

Defendant next argues that the trial court erred in excluding evidence concerning whether defendant suffered HIV and Hepatitis C and whether the victim contracted these diseases. We agree that the trial court erred, but find the error does not warrant reversal.

“Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence.” *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002); MRE 401. It is common knowledge that HIV and Hepatitis C are conditions that can be transmitted in the course of sexual penetration. It is also common knowledge that not every act of sexual penetration between a person infected with HIV and Hepatitis C and an uninfected person will necessarily result in transmission of either condition. Nevertheless, evidence that a defendant has those conditions and did not transmit either of them to the victim whom he allegedly sexually penetrated would have had some tendency to make it less probable that penetration occurred.

But even assuming that the victim tested negative for HIV and Hepatitis C² while defendant tested positive, any error in excluding such evidence does not warrant reversal. The alleged error in trial court’s evidentiary ruling is properly classified as a preserved, nonconstitutional error. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). A preserved, nonconstitutional error is not ground for reversal unless, after an examination of the entire cause, it affirmatively appears more probable than not that the error was outcome determinative. *Id.*; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Because sexual penetration by a person with a sexually transmitted disease of an uninfected person does not necessarily result in transmission, evidence that the victim did not test positive for HIV or Hepatitis C, although relevant, would not have been conclusive of whether defendant penetrated her anus with his penis. Therefore, we find it is not more probable than not that exclusion of any evidence in this regard was determinative of the verdict in this case.

¹ At the time of the alleged incident, this same definition was found at MCL 750.520a(l).

² Although the record is unclear as to whether the victim was tested, it is unlikely that the victim would not be tested given the serious nature of these communicable diseases. It is similarly unlikely that, if the victim tested positive, the prosecution would not have proffered evidence in that regard.

III. Court-appointed Investigator

Defendant next argues that the trial court erred in denying his request for a court-appointed investigator to discover whether the victim made similar allegations against another person. We disagree.

We review a trial court's denial of a defendant's motion for funds to hire an investigator for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001); *People v Blackburn*, 135 Mich App 509, 520-521; 354 NW2d 807 (1984). Defendant has not shown under the facts and circumstances of this case that an investigator was "necessary to afford him due process or that the trial court's ruling substantially prejudiced him." *Johnson, supra* at 260. The trial court did not err in denying defendant's request.

IV. Taint Hearing

Defendant next argues that the trial court erred in denying his motion for a taint hearing. We disagree.

We review questions of law de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). Currently, there is no statute, court rule, or rule of evidence that requires or sets forth procedure for conducting a taint hearing in cases alleging sexual abuse of a minor. Under Michigan law, there are other procedures to protect against fabricated or unreliable testimony. The trial court can exclude the testimony of a witness if that witness is found incompetent under MRE 601 which provides:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

Additionally, if the alleged victim is found competent to testify, defense counsel is free to cross-examine the alleged victim and other witnesses regarding interview procedures. The credibility of the witnesses, including the alleged victim, is then for the trier of fact to decide. *Wolfe, supra* at 514-515.

V. Instructional Error

Defendant next argues that the trial court erred in denying a requested jury instruction. We disagree.

This Court reviews claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions must include all the elements of the charged offenses and shall not exclude any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

Defendant requested that the trial court give the following jury instruction:

(1) You have heard evidence that the defendant could not have committed the crime because he suffered from impotency / erectile dysfunction when the alleged crime was alleged to have been committed.

(2) The prosecutor must prove beyond a reasonable doubt that the defendant was not suffering from erectile dysfunction/impotency when the alleged crime was committed.

(3) If, after carefully considering all the evidence, you have a reasonable doubt about whether the defendant was able to perform the act of sexual penetration because of erectile dysfunction/impotency you must find him not guilty.

We find the trial court did not err in denying this request because the instruction was incorrect as a matter of law. MCL 750.520b requires “sexual penetration” as an element of CSC I. MCL 750.520a(o) defines “sexual penetration” as any intrusion “however, slight, of any part of a person’s body.” The proposed instruction incorrectly indicates that the prosecution had prove beyond a reasonable doubt that defendant did not suffer from erectile dysfunction or impotency at the time of the alleged crime. The trial court did not err in denying defendant’s request for this instruction.

VI. Prosecutorial Misconduct

Defendant next argues that he is entitled to a new trial because of prosecutorial misconduct. We disagree.

We review claims of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines*, *supra* at 763.

Defendant argues that the prosecutor improperly appealed to the jury’s sympathy for the victim. “Appeals to the jury to sympathize with the victim constitute improper argument.” *People v Watson*, 245 Mich 572, 591; 629 NW2d 411 (2001). We find the prosecutor’s statement urging the jury not to give the victim another reason to be angry, upset, and “let down” constituted an improper appeal to the jury to sympathize with her. It was improper particularly in that it urged the jury to consider the effect an acquittal would have on the victim. Nevertheless, defendant has not avoided forfeiture of this issue under the *Carines* standard. Although the appeal to sympathy in question constituted plain error, it is not more likely than not that the error seriously affected the fairness, integrity, or public reputation of defendant’s trial. The comment was isolated, and the trial court instructed the jury that it must not let sympathy influence its decision. *Watson*, *supra*, at 591.

Defendant also complains that the prosecutor improperly argued that defense counsel mislead the jury. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Watson*, *supra* at 592. The prosecutor’s remarks were proper in that they responded to arguments made by defense counsel in closing argument. The prosecutor’s argument that defense counsel did not raise a reasonable doubt as to defendant’s guilt was also

within the bounds of proper prosecutorial argument. Because the prosecutor's remarks were not improper, we find they did not constitute plain error. Accordingly, we also find unpersuasive defendant's claim of ineffective assistance of counsel based on failure to object to the prosecutor's remarks.

VII. Sentencing

Defendant also argues that the trial court erred in its scoring of offense variable 3 (OV 3) and offense variable 4 (OV 4). We disagree.

A sentencing court has discretion in scoring guidelines variables. Scoring decisions supported by any evidence will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The trial court's scoring of five points for OV 3 correlates with a finding that "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33. The trial court scored OV 3 based on the victim's testimony that she suffered pain when defendant anally penetrated her. Because pain generally indicates bodily injury of some type, the trial court's scoring of OV 3 was supported by the victim's testimony.

The trial court's scoring of OV 4 correlates with the trial court finding that the victim suffered "[s]erious psychological injury requiring professional treatment." MCL 777.34. Importantly, MCL 777.34(2) provides that "the fact that treatment has not been sought is not conclusive" in scoring OV 4. The victim stated on a victim impact form that she thought defendant should pay for her counseling. Also, in a written statement attached to that form, the victim wrote to defendant: "You don't even know what you done [sic] to me in my mind[.]" Based on these statements, the trial court did not err in scoring ten points for OV 4.

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly